

Bateman (Migration) [2019] AATA 394 (25 January 2019)

CORRIGENDUM

DIVISION: Migration & Refugee Division

APPLICANT: Mr Jack Nicholas Guy Bateman

CASE NUMBER: 1714953

DIBP REFERENCE(S): BCC2016/1188114

MEMBER: David Barker

DATE OF DECISION: 25 January 2019

**DATE CORRIGENDUM
SIGNED:** **13 March 2019**

PLACE OF DECISION: Sydney

AMENDMENT: The following corrections are made to the decision:

- 1.
2. Paragraph 29 of the Decision Record should be disregarded in full, as it is a typographical error. The following sentence in the Decision Record, which is in italics font, *“As to the opinion of the persons’ friend and acquaintances about the nature of the relationship?”* is a subtitle and should not be accorded a paragraph number.
- 3.
- 4.
5. Statement made on 13 March 2019 at 1:35pm

David Barker
Member

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Jack Nicholas Guy Bateman

CASE NUMBER: 1714953

HOME AFFAIRS REFERENCE(S): BCC2016/1188114

MEMBER: David Barker

DATE: 25 January 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations
- r.2.03A

Statement made on 25 January 2019 at 2:44pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine de facto relationship – credible witnesses – Tribunal has more information available to it than was available to delegate – parties have a mutual commitment to a shared life together – decision under review remitted

6.

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65

Migration Regulations 1994 (Cth), rr 1.09A, 2.03A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

7. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
8. The applicant applied for the visa on 16 March 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
9. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because they were not satisfied the evidence available to the Department at the time of the delegate's decision demonstrated the applicant was the spouse of the sponsor, as defined under section 5CB of the Act.
10. The applicant appeared before the Tribunal on 3 January 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor.
11. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
12. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

13. BACKGROUND

14. The applicant is a national of the United Kingdom (UK) and is 51 years old. He was previously married, with the proceedings associated with his divorce finishing in March 2016.
15. The sponsor was born in the UK and is 65 years old. She came to Australia in or around 1985 and was subsequently granted Australian citizenship in June 2018.
16. In written statements regarding the history of his relationship with the sponsor, the applicant stated they met in Paddington, NSW in September 2014 and shortly thereafter started dating. He states they started living together in an apartment owned by the sponsor in Bondi in January 2015 and have since that time shared a household.
17. Prior to and following the hearing the applicant provided additional documents to the Tribunal, including but not limited to the following:
 - written statements from the applicant and sponsor;
 - written submissions from the representative,
 - photographs;
 - co-habitation agreement;
 - wills, superannuation information, bank statements and other financial records;
 - witness support declarations.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The issue in the present case is whether the applicant and her sponsoring partner were in a genuine spousal or de facto relationship at the time of application and at the time of this decision.
19. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files as well as the oral evidence provided by the applicant and sponsor at the hearing.
20. The parties' oral evidence regarding the circumstances in which met, the development of their relationship and their current living circumstances was consistent and credible. Their oral evidence during the hearing was also consistent with the documentary evidence provided with the review application. I found the parties to be credible witnesses who gave their evidence in a calm, elaborative and rational manner without embellishment. The Tribunal has considerably more information available to it than was available to the delegate at the time of their decision and I am satisfied weight can be given to the parties' evidence in relation to the nature of their relationship circumstances.

Whether the parties are in a spouse or de facto relationship

21. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Are the parties in a de facto relationship?

22. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
23. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
24. The applicant and sponsor gave consistent evidence that their relationship is appropriately contextualised as a committed relationship between two mature aged people who had extensive lived experience before they met and their relationship developed. The Tribunal considers this a reasonable contention, given the age of the parties. The applicant conceded that there was minimal evidence before the Department at the time of the delegates decision and that this was due to a range of factors, including the parties' naivety about what was expected by the department and also in part due to a conflictual property settlement from the applicant's previous marriage, which was occurring concurrently with the processing of his visa application. The applicant contends he did not want to expose the sponsor to any possible financial risk through their financial affairs and other aspects of their relationship appearing overtly merged before his divorce was finalised.

25. The financial aspects of the relationship

26. *Are there any joint ownership of real estate or other major assets?*

27. The applicant gave evidence he and the sponsor jointly own no real estate. he said the sponsor owns the property in which they reside in Bondi, NSW and has responsibility for the mortgage over this property. He said he has property assets in the UK. he said he intends to consolidate some of these assets into funds that will be available to him in Australia once his visa status becomes clear. The parties both gave evidence that they do not consider it necessary of wise to merge all of their assets, but they do intend to jointly purchase an appropriate property in a rural or regional part of NSW so that they can establish a Bed and Breakfast business together.

28. *Are there any joint liabilities?*

29. The applicant gave evidence he and the sponsor do not have any joint liabilities.

30. *As to the extent of any pooling of financial resources, especially in relation to major financial commitments?*

31. The parties gave evidence that the sponsor has responsibility for the payment of her mortgage, rates and utility bills associated with her apartment in Bondi, where the parties reside. They gave consistent evidence that the applicant transfers \$1,200 per month into a bank account operated by the sponsor and that these funds are then put towards the parties regular living expenses and also towards any maintenance costs associated with the sponsor's apartment. The financial records provide with the review application support this claim.

32. *As to whether one person in the relationship owes any legal obligation in respect of the other?*

33. The parties gave evidence the sponsor has been named as the beneficiary of the applicant's life insurance policy. The parties have identified each other as the beneficiaries in their respective superannuation policies and wills.

34. *As to the basis of any sharing of day to day household expenses*

35. As is discussed above, the applicant deposits funds into the sponsor's bank account on a regular basis, in lieu of rent and to provide for his share of regular living expenses. The financial records provide with the review application support this claim.

36. *Assessment of the financial aspects of the parties' relationship*

37. The banking records and other financial evidence provided with the review application is consistent with the applicant's claims. The Tribunal accepts that both the applicant and sponsor share the cost of day to day living expenses and pool their funds towards costs associated with the sponsor's residential property in Bondi. There is no indication of the parties' owning any major assets together and they do both have assets in their own name. The Tribunal does not consider this to be unusual for people of their stage of life and has drawn no adverse inference from this. Overall, the parties' discussion of their financial circumstances was reasonable and plausible. I consider the financial aspects of the parties' relationship to be supportive of the contention they are in a genuine and continuing de facto relationship.

38. **The nature of the household**

39. *Is there any joint responsibility for the care and support of children?*

40. The applicant gave evidence that she and the sponsor have no shared responsibility for the care and support of children.

41. As to the living arrangements of the persons?

42. the applicant claims to have shared a household with the sponsor in her residential property in Bondi since January 2015. In support of this claim he has provided correspondence and other documentary evidence identifying the Bondi address as both of their residential addresses. he has also provided photographs of the parties at this property and multiple witness support declarations from people who attest to the parties' living together in Bondi. The Tribunal is satisfied this evidence is credible and finds the parties have shared a household together since January 2015.

43. As to any sharing of the responsibility for housework?

44. Both the applicant and sponsor gave consistent evidence they share cleaning, cooking and related tasks on an informal basis. They gave consistent evidence that in recent times the sponsor has done the majority of tasks associated with heavy lifting due to some temporary physical restrictions affecting the sponsor due to a knee condition. The applicant gave evidence they also periodically utilise a cleaning service and provided documentary evidence to support this claim.

45. Assessment of the nature of the parties' household arrangements

46. The Tribunal considers there to be nothing particularly unusual or untoward about the parties' household arrangements. I am satisfied the nature of the household aspects of the parties' relationship support to the contention they are in a genuine and continuing de facto relationship.

47. The social aspects of the relationship

48. As to whether the persons represent themselves to other people as being in a de facto relationship with each other?

49. The parties gave consistent evidence that they have led a fairly quiet life and enjoy each other's company at home. The applicant contended he had a media presence in his home country and has in more recent years purposively adopted a low public profile so as to avoid unwanted attention. The Tribunal is satisfied this is a reasonable claim on his part. The parties have registered their relationship with the authorities in NSW.

50. contact with their respective family networks, with more regular contact occurring with the

51. As to the opinion of the persons' friends and acquaintances about the nature of the relationship?

52. The Tribunal has reviewed multiple witness support statements from friends and relatives of the applicant which provide credible statements in support of the genuine nature of the parties' commitment to their relationship. The Tribunal is satisfied the depth of information in these witness statements display the basis on which the friends and family members of the applicant are aware and believe that the parties are in a committed, genuine and continuing relationship with each other.

53. The sponsor was an only child and has no immediate family relatives. The Tribunal has reviewed some photographs provided with the review application and I accept the parties are

known to be a couple by members of the applicant's family and by a range of friends and acquaintances.

54. *As to any basis on which the persons plan and undertake joint social activities?*

55. The parties gave consistent evidence they enjoy going to a local club to participate in trivia quizzes. They both also gave consistent evidence they periodically book into a nice hotel in the eastern Suburbs for a night or weekend to treat themselves.

56. *Assessment of the social aspects of the parties' relationship*

57. Based on the available evidence the Tribunal is satisfied that the parties jointly plan and undertake holidays and social activities and represent themselves to their families and other people as being in a committed relationship.

58. **The nature of the persons' commitment to each other**

59. *As to the duration of the relationship?*

60. The Tribunal accepts the parties have been in a committed relationship with each other since January 2015, a period four years.

61. *As to the degree of companionship and emotional support that the persons draw from each other?*

62. Both the applicant and sponsor emphasised the emotionally supportive nature of their relationship. The sponsor described how supportive the applicant had been over the past few years whilst she has been visiting the UK on several occasions in order to support her frail, elderly mother, who has now passed away. She said this was an emotionally difficult time, as she has no siblings and her mother had few surviving relatives in the UK. She described the applicant as a very important source of practical and emotional support during this period. the applicant emphasised how compatible the parties' nature are and the manner in which the sponsor was there for him in what unexpectedly turned out to be a very conflictual property settlement with his ex-wife, from whom he had been separated for quite a few years.

63. The Tribunal accepts these claims and noted that the parties were demonstrably comfortable with each other during the hearing.

64. *As to whether the persons see the relationship as a long term one?*

65. The applicant gave evidence he and the sponsor have congruent life goals. His description of these goals was entirely consistent with hers. They both discussed their hope to set up a bed and breakfast, or similar style business in a regional or rural area, away from the metropolitan area. They described a wish to support each other over their remaining years. The Tribunal accepts the parties see their relationship as long term. The Tribunal accepts the parties have a commitment to supporting each other and have viable plans for their future life together.

66. *Assessment of the nature of the persons' commitment to each other*

67. The Tribunal has placed considerable weight on this aspect of the parties' relationship and views it as a strong indicator that they are in a genuine and continuing de facto relationship. I am satisfied the parties are in an exclusive relationship and that they have a mutual commitment to a shared life together. I am satisfied they see their relationship as long term

and have placed weight on the duration of the relationship, which has now existed for over four years.

68. *Conclusion on de facto criteria*

69. Having regard to all the circumstances of this relationship, the Tribunal is satisfied that the parties have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal is satisfied that the relationship between them is genuine and continuing. The Tribunal finds the parties live together and have not lived separately and apart on a permanent basis since January 2015. The parties are not related by family. The Tribunal finds that the requirements of s.5CB(2) are met at the time of the application and at the time of decision.
70. The applicant's sponsor has turned 18 years of age and therefore satisfies the criteria in cl.820.211(2)(c). At the time of application, the applicant held a substantive visa and so the criteria in cl.820.211(2)(d) is not relevant.
71. The Tribunal further finds that at the time of this decision the applicant continues to be the sponsor's de facto partner, and continues to meet the requirements of cl.820.211(2).
72. Therefore, the applicant meets cl.820.211 and cl.820.221.

Are the additional criteria for a de facto relationship met?

73. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
74. The Tribunal has been provided with a Relationship Certificate issued by NSW Births, Deaths and Marriages, which states the parties registered their relationship on 9 September 2017. Accordingly, the Tribunal finds the parties relationship is registered under NSW law.
75. The Tribunal is satisfied both the applicant and sponsor were over the age of 18 years at the time the application for the Partner visa was lodged on 16 March 2016.
76. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
77. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

78. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations

- r.2.03A

David Barker
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).